105

Supreme Court, U.S.
FILED
08-359 SEP 19 2008
OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court of the United States

MADELINE DEMPSTER,

Petitioner,

-against-

GEORGE C. DEMPSTER, the law firm of SHAW, LICITRA, BOHNER ESERNIO, SCHWARTZ & PFLUGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARD FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS F. LIOTTI*
600 Old Country Road, Suite 530
Garden City, New York 11530
(516) 794-4700
Attorneys for Petitioner
*Counsel of Record

Jennifer L. McCann, Esq.
On the Petition

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Second Circuit erred in upholding the application of the Mailbox Rule to ECF communications?

2. Whether the Court of Appeals for the Second Circuit erred by ignoring *Erie v. Thompkins* when in absence of Federal Procedure Law, they followed case law contrary to New York State statutes?

3. Whether the Court of Appeals for the Second Circuit erred in finding that the District Court properly refused to reopen the time for filing a notice of appeal for the Petitioner?

4. Whether the Court of Appeals for the Second Circuit erred in finding that the petitioner had not overcome the presumption of notice and receipt of an ECF email communication?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

CONCISE STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 6

REASONS FOR GRANTING THE PETITION ... 7

I. THE CIRCUIT COURT INCORRECTLY FOUND THAT PETITIONER'S COUNSEL HAD RECEIVED THE MARCH 30, 2005 ECF COMMUNICATION 7

II. THE SECOND CIRCUIT ERRONEOUSLY UPHELD THE DISTRICT COURT'S APPLICATION OF THE "MAILBOX" RULE TO EMAIL COMMUNICATIONS 17

III. THE SECOND CIRCUIT COURT OF APPEALS ERRONEOUSLY DISREGARDED *ERIE V. THOMPKINS* 19

CONCLUSION 21

APPENDICES 1a

Memorandum and Order of the Eastern District of New York dated March 31, 2004 ..... 1a

Memorandum and Order of the Eastern District of New York dated March 30, 2005 ..... 17a

Memorandum and Order of the Eastern District of New York dated December 13, 2005 ..... 32a

Memorandum and Order of the Eastern District of New York dated September 22, 2006 ..... 42a

Summary Order of the United States Court of Appeals for the Second Circuit dated April 11, 2008 ..... 54a

Order of the United States Court of Appeals for the Second Circuit dated June 20, 2008 ..... 59a

TABLE OF AUTHORITIES

CASES PAGE

Adams v. Lindsell, 106 Eng. Rep. 250 (1818) 8

American Boat Company v. Unknown Sunken Barge, 418 F.3d 910 (8th Cir. 2005) 6, 8, 17

Avolio v. County of Suffolk, 29 F.3d 50 (2d Cir. 1994) 8, 9

Daubert v. Merrel Dow, 509 U.S. 507, 113 S.Ct. 2786 (1993) 11

Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437 (1960) 8

Erie v. Tompkins, 304 U.S. 64 (1938) 6, 19, 20

Faiz v. City of New York, E.D.N.Y. Docket No.: 03-CV-595 16

STATUTES

18 U.S.C. §§ 157, 3057 1

18 U.S.C. § 1961, *et seq* 1

28 U.S.C. §§ 158 1

28 *U.S.C.* §1254 1

28 U.S.C. §§ 1291 1

28 U.S.C. § 1367(a) 1

28 *U.S.C.* §2101 1

Fed. R. App. P. 4(a)(6) 7

Fed. R. Civ. P. Rule 4(a)(1)(A) 1

Fed. R. Civ. P. Rule 26(b)(2) 14

New York Civil Procedure Laws and Rules
§ 5016 20

State of New York Debtor and Creditor Law
§ 276(a) 1

OPINIONS BELOW

The judgment and opinion of the Court Of Appeals, Second Circuit, was issued in a summary order filed on April 11, 2008. Rehearing was denied on June 20, 2008.

JURISDICTION

Subject matter jurisdiction of the United States District Court for the Eastern District of New York was conferred pursuant to 18 U.S.C. § 1961, *et seq*, and that court's pendent and ancillary jurisdiction concerning state law claims pursuant to 28 U.S.C. § 1367(a); 18 U.S.C. §§ 157, 3057; and New York State's Debtor and Creditor Law § 276(a).

Appellate jurisdiction was purportedly conferred on the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §§ 158 and 1291.

Pursuant to 28 *U.S.C.* §2101 and Rule 13 of this Court, this petition for a Writ of Certiorari was filed within ninety (90) days after entry of the order denying discretionary review. The statutory provision believed to confer jurisdiction on this Court to review this Writ of Certiorari is 28 *U.S.C.* §1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. App. P. 4(a)(1). **Time for Filing a Notice of Appeal:**

"(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a)."

Fed. R. App. P. 4(a)(6). **Reopening the Time to File an Appeal:**

"The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced."

Fed. R. App. P. 26(b). **Extending Time:**

"For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law."

N.Y. C.P.L.R.§ 5016. **Entry of judgment:**

"(A) What constitutes entry. A judgment is entered when, after it has been signed by the clerk, it is filed by him.

(B) Judgment upon verdict. Judgment upon the general verdict of a jury after a trial by jury as of right shall be entered by the clerk unless the court otherwise directs; if there is a special verdict, the court shall direct entry of an appropriate judgment.

(C) Judgment upon decision. Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment."

CONCISE STATEMENT OF THE CASE

The Petitioner is the former wife of the Respondent, George G. Dempster (hereinafter "George G. Dempster"), who is *pro se* in the appeal, but who, during a bitter matrimonial and related proceedings had been represented by the co-Respondents, among others.

The underlying claim sounds in civil RICO. On March 31, 2004, United States District Court Judge Seybert (E.D.N.Y.) dismissed those claims without prejudice. The Petitioner then filed an Amended Complaint on May 12, 2004. The Petitioner responded by filing a timely Amended Complaint. On March 30, 2005, Judge Seybert dismissed the RICO claims with prejudice and the Petitioner's state law claims without prejudice, finding, *sua sponte*, that the statute of limitations for federal civil RICO claims is four (4) years. Since the Petitioner 's complaint was filed on March 3, 2003, Judge Seybert held that the civil RICO claims alleged by the Petitioner, in order to be viable, had to have involved allegations occurring after March 3, 1999. The lower court found that the only part of the civil RICO action that could be considered timely involved an April, 1999 bankruptcy petition. But Judge Seybert also held that "the amended complaint [did not] allege how the bankruptcy proceeding relates to the scheme to deprive her of marital assets – the purpose of the alleged RICO enterprise." Judge Seybert's decision was then ECF e-mailed on that date but Petitioner's counsel did not become aware of it until August, 2005, whereupon Petitioner's counsel promptly, on August 24, 2005, filed a motion and

memorandum of law in support thereof for an extension of time to file a Notice of Appeal.

On December 13, 2005, the lower court directed that an evidentiary hearing be conducted before Magistrate Arlene R. Lindsay, concerning "whether and when plaintiff's counsel received notice of the March 30, 2005 Order and Judgment" by Judge Seybert. An evidentiary hearing was then held before Magistrate Lindsay on February 17, 2006 and February 22, 2006.

Although denied by Petitioner's counsel and his staff, Magistrate Lindsay's Report and Recommendations of May 12, 2006 found that the ECF e-mail notification of March 30, 2005 had been sent to and was received by plaintiff's counsel's office. On September 22, 2006 in a Memorandum and Order, Judge Seybert determined that plaintiff had "not sufficiently rebutted the presumption of the receipt" of her March 30, 2005 Order.

Petitioner then appealed the September 22, 2006 Memorandum and Order to the Second Circuit Court of Appeals on March 2, 2007. Oral argument commenced on April 10, 2008. The Second Circuit issued a decision on April 11, 2008 finding that the Petitioner's counsel had not overcome the presumption of receipt of the ECF communication which contained the March 30, 2005 Order. Petitioner requested rehearing, or in the alternative, rehearing *en banc*, which was denied on June 20, 2008.

SUMMARY OF ARGUMENT

The Court of Appeals for the Second Circuit's denial of Petitioner's appeal was based upon its own creation of procedural law in the absence of Federal Rules. Petitioner contends that pursuant to *Erie v. Thompkins*, 304 U.S. 64 (1938) in the absence of Federal Procedure law, the Court should look to New York State statutes before creating common law.

Magistrate Lindsay cited *American Boat Company, Inc. v. Unknown Sunken Barge, Adams v. Lindsell*, 106 Eng. Rep. 250 (1818), in her Report and Recommendation to Judge Seybert, who upheld the application of Mailbox Rule to ECF communications in the Eastern District of New York in the absence of a Federal Procedure law regarding the standard for establishing that effective notice was actually received. The common law Mailbox Rule presumes that if the sender can prove the letter was mailed, then the burden of proof falls to the recipient to establish that it was not actually received. In New York State, procedural laws require that Notice of Entry be mailed by the prevailing party to the opposition and an Affidavit of Service be filed with the Court. In creating common law in the absence of Federal Procedure, Judge Seybert failed to apply New York State procedural law contrary to the seminal holding of *Erie v. Thompkins, supra.* In doing so, Judge Seybert deemed that it was Petitioner's burden to overcome the presumption of receipt of the March 30, 2005 ECF and that Respondent did not have to send Notice of Entry or provide an affidavit of service. She found that Petitioner had not overcome that presumption of ECF receipt. The Court of Appeals for the Second Circuit

affirmed her findings without addressing the erroneous adoption of new law in lieu of the proper application of a contrary New York State statute.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURT INCORRECTLY FOUND THAT PETITIONER'S COUNSEL HAD RECEIVED THE MARCH 30, 2005 ECF COMMUNICATION

On April 11, 2008 a finding of fact was made by the Second Circuit Court of Appeals that had not been previously reached by the Eastern District of New York: that the missing March 30, 2005 ECF had been received by Petitioner's counsel. In the District Court, Judge Seybert, based on the report and recommendation of Magistrate Lindsay, found that Petitioner's counsel had not overcome the presumption of receipt. Judge Seybert did not conclude that Petitioner's counsel had received the email, but that presumption had not been overcome, thereby ruling that Mailbox Rule applied to ECF communications. Furthermore, the evidence of receipt that the Second Circuit finds to be "overwhelming" was improperly obtained, inaccurate, and incomplete.

When Petitioner did not receive Notice of Entry of the Order dismissing her case, she should have been granted additional time in which to file her notice of appeal. In compliance with Federal Rule of Appellate Procedure 4(a)(6), Petitioner filed her motion to reopen

the time in which to file her appeal within 180 days of the Order, as Petitioner, she was entitled to notice and no party would be prejudiced within in the interpretation of .

Petitioner's entitlement to Notice of Entry and the lack of prejudice against Respondents are not in dispute. What is in contention is whether plaintiff's counsel received the notice of entry of the judgment from the District Court. Notably, although the statute permits the defendants to serve a notice that judgment was entered dismissing the plaintiff's action, it is clear that the defendants did not do so.

In *Avolio v. County of Suffolk*, 29 F.3d 50 (2d Cir. 1994), the Court of Appeals in the Second Circuit reviewed the history of Rule 4 and discussed the intent of Congress with respect to affording parties the right to protect their appellate position when a losing party does not receive notice of entry of a judgment dismissing an action. The Court noted that *Fed.R.App.P.* 4(a)(6) was added specifically to address and remedy the type of problem presented in cases where failure to timely appeal was caused by not having received notice of the entry of judgment.

In *Adams v. Lindsell*, 106 Eng. Rep. 250 (1818), Mailbox Rule was created. The rule provides that acceptance of mail takes effect upon dispatch even if the acceptance fails to arrive at its destination.

In *American Boat Company, Inc. v. Unknown Sunken Barge*, 418 F.3d 910 (8th Cir. 2005), the Court of Appeals in the Eighth Circuit held that the presumption of notice may be overcome by proving through reliable evidence that it had not been received, thereby applying Mailbox Rule to ECF

communications. On the issue of reliable evidence, the Circuit Court looked to *Elkins v. United States*, 364 U.S. 206, 218, 4 L.Ed.2d 1669, 80 S.Ct.1437 (1960), in which it was noted that it is never easy to prove a negative. *Elkin* further explains that in the matter of notice, there is often little that one can do other than swear notice was not received.

Testimony Presented At The Finding Of Fact

The April 11, 2008 decision by the Second Circuit failed to accurately portray the testimony presented to the finder of fact. In its decision, the Circuit Court only refers to a small portion of the testimony by the District Court's ECF administrator. It disregards the other testimony provided by additional witnesses, and incorrectly ignores the holes in the ECF administrator's testimony.

On February 17, 2006 Magistrate Judge Arlene R. Lindsay commenced a fact finding hearing to determine if the missing ECF communication was received by the intended email recipient, maria@tliotti.com. Magistrate Lindsay ruled that she would not permit the plaintiff's counsel's expert to render an opinion but that she had *sua sponte* called the Trial Court's own expert, Doug Palmer, without notice to counsel. Prior to the hearing date, plaintiff's counsel provided the Trial Court with affidavits from Maria Albano and Ellen Luxmore, paralegal and secretaries from Mr. Liotti's Office, and Thomas F. Liotti, Esq., as to the full extent of their proffers, as well as disclosure concerning plaintiff's counsel's expert, Jeff Tanenbaum.

Maria Albano, Office Manager and Administrative Assistant at Law Offices of Thomas F. Liotti, testified that ECF notifications to the Law Offices of Thomas F. Liotti would come to her mailbox known as maria@tliotti.com. Ms. Albano would check her e-mails a few times each day. The procedure in the office was for Ms. Albano to print out the e-mails and provide them to Thomas F. Liotti, Esq., who would then mark them up and give them back to Mrs. Albano. At the time of her testimony, Ms. Albano worked for Mr. Liotti for 15 years and had been a legal secretary for over 30 years.

Ms. Albano was on medical leave and out of the office from February 22, 2005 to the end of May, 2005 or early June, 2005. Ms. Albano testified that in her absence, Ellen Luxmore, a secretary and paralegal in the Law Offices of Thomas F. Liotti, took over the responsibility of checking for ECF e-mails. When she returned to work, Ms. Albano resumed checking her e-mails and she checked the e-mails that were accumulated in her inbox; she deleted the junk mail and checked for ECF e-mails. Ms. Albano determined that there were no unread ECF messages and deleted them into the trash section. Ms. Albano testified that she became aware of a missed deadline and Judge Seybert's decision when a letter was received from the plaintiff.

Ellen Luxmore, a secretary and paralegal in the Law Offices of Thomas F. Liotti for 15 years, testified that when Maria Albano was out of the office, she took over Ms. Albano's responsibilities, including checking on ECF communications and providing them to Mr. Liotti. She checked for ECF communications daily while Maria was out of the office. She was responsible

for checking for ECF e-mails in March and April, 2005. Ms. Luxmore did not see an ECF of Judge Seybert's decision and was unaware that Judge Seybert had dismissed the case. She further testified that Mr. Liotti then directed Ms. Luxmore to go through the entire file to determine whether an ECF had been received and it had not been.

Thomas F. Liotti, Esq., plaintiff's counsel and the undersigned, testified that the reputed ECF notification had not been seen and testified that a comprehensive search for the ECF had been made upon receipt of a letter from Ms. Dempster advising him of the dismissal of the action. Mr. Liotti also promptly filed a motion and memorandum with the Trial Court to file a Notice of Appeal out of time (TR 48).

Jeff Tanenbaum, a senior partner at Jordan Associates Integrated Systems, was plaintiff's counsel's expert. Jordan Associates Integrated Systems is a company that installs computers, computer systems and related activities. Twenty per cent (20%) of his business is devoted to e-mail solutions. His firm trained the e-mail users in the Liotti law offices. The witness testified about his extensive experience in the field of computer technology. Mr. Tanenbaum described the function of e-mails. Importantly, Mr. Tanenbaum testified that the e-mail has to go through a route, a series of "hops" and servers until ultimately they may reach a destination such as Mr. Liotti's office. Mr. Tanenbaum testified that 20 per cent (20%) of e-mails intended for recipients are not delivered. The Magistrate declined to permit the witness to testify about a study involving the reliability of the receipt of e-mails. The Trial Court erroneously declined to consider testimony from the witness about studies he

reviewed concerning the reliability of e-mail service without the benefit of a *Daubert* Hearing. See *Daubert et al v. Merrell Dow*, 509 U.S. 507, 113 S.Ct. 2786 (1993). If the Court had conducted a *Daubert* hearing and permitted Mr. Tanenbaum to offer his opinion in totality, it would have learned that high failure rate includes mostly spam and unsolicited emails. It would have also included an explanation as to how spam filters work and why they are so successful.

The Court, *sua sponte*, called Douglas Palmer, the ECF administrator employed by the Eastern District of New York. Mr. Palmer testified that only two reports of unsuccessful ECF messages had been received, Mr. Liotti's being one of them. He also stated that no DSN permanent failure message had been received from maria@tliotti.com. He further testified that a MTA test could have been conducted by Mr. Liotti to help determine the location of the missing ECF. What is not preserved in the record is that Mr. Palmer's testimony was disingenuous. Mr. Palmer testified that he had inspected the EDNY servers. He failed to notify the Court that all ECF communications are routed through the main Federal Court servers in Washington, D. C., and that he did not inspect those servers. He failed to notify the Court that spam filters prevent the sending and receipt of DSN permanent failure messages. He failed to tell the Court that if the EDNY server had a functional spam filter and that spam filter had blocked a DSN permanent failure message from maria@tliotti.com, that the DSN message would have been automatically deleted within a few days after it was sent. He further failed to fully explain to the Court that a Mail Transfer Agent route test can only show the likely path an email message might have

taken from one location to another. Furthermore, Mr. Palmer failed to tell the Court that missing emails are not lost objects that can eventually be recovered, but rather, that they are deleted after they have been undeliverable for a short period of time and they cease to exist.

Liotti's Failure To Conduct A Mail Transfer Agent Route Test Was Moot

The Second Circuit's language in the April 11, 2008 decision makes it questionable as to whether the panel understood the significance of a Mail Transfer Agent (MTA) route test any better than Magistrate Lindsay. The Circuit Court faults Mr. Liotti for not performing certain "types of investigations on his own computer system." However, conducting an MTA test would not provide any specific information as to what occurred on March 30, 2005. It would only show the path that most emails take from one server to the next. It would establish that emails can be sent from the District Court and can be received by maria@tliotti.com most of the time. This is self-evident because Mr. Liotti receives numerous ECF communications daily from the District Court. A test to establish that his server can receive such messages cannot prove that he has received every single message.

A Mail Transfer Agent route test consists of sending emails between the District Court and Mr. Liotti's email address for ECF receipt, maria@tliotti.com. The test would establish that the majority of those messages took a certain path from the Court's server to maria@tliotti.com. It does not

establish what occurred on March 30, 2005. It does not show which messages were lost, where the messages became lost, what stopped the messages between the servers, what hops the March 30, 2005 email took, what firewalls are on those hops, what spam filters were in effect, what DSN messages were created, what path the DSN messages use, which DSN messages were blocked by firewall or spam filters, or any other relevant information. Noteably, the Circuit Court disregarded the very testimony of Mr. Palmer, who confirmed that the MTA test cannot provide confirmation of the exact route the message took, nor will it provide confirmation of delivery.

As of December 1, 2006, the amended Federal Rules of Civil Procedure outlined the Court's ability to compel electronic discovery in Rule 26(b)(2). The Court of Appeals in the Second Circuit erroneously disregarded Rule 26(b)(2) when it found that Mr. Liotti should have expended extraneous time and money on "inspections" that would signify no answer as to the whereabouts of the missing ECF. While the amended FRCP was not yet in effect when Judge Seybert issued her Order, the Circuit Court should have considered these new discovery limitations in its determination.

Relevance Of DSN Permanent Failure Messages

DSN permanent failure messages are those messages sent back from an email recipient's server to notify the sender that the initial email was undeliverable. For a DSN message to be created, the initial email must have traveled to the email recipient's host server, but the host server could not find the valid address. For example, Mr. Palmer sent two emails to

maria@tliotti.com and jean@tliotti.com on March 31, 2005 or April 1, 2005. Mr. Palmer testified that only one of those messages was successful, yet no DSN permanent failure message was received by the District Court. This means that the Liotti server received two messages, but the server was unable to access either the address for maria@tliotti.com or jean@tliotti.com. Mr. Palmer was unable to distinguish which email had failed or what they message contained. Mr. Palmer further testified that while he did check for DSN permanent failure messages from maria@tliotti.com on the date of March 30, 2005 and April 1, 2005, but he was unable to find a DSN message specific to the Dempster Order. However, he acknowledged that DSN messages are not always sent back to the initial email sender within a day or two. It can take several days depending on the specifications of the recipient's server.

It is also of note that DSN messages are not always generated. First, the email must reach the email recipient's host server. However, even if the March 30, 2005 email message reached the Liotti server, it is possible that the server did not generate a message or that it was blocked by a spam filter. One of the most effective ways in which a spam filter works is not only to refuse to deliver unwanted, unrecognized mail, but also to prevent the generation of a DSN message. If a spam mailer receives a DSN message, the mailer knows that the email address to which he or she sent the email was valid, the server is functional, and the mailer can learn how to circumvent the spam filter. By blocking the creation of DSN messages and deleting the spam emails, spam filters effectively prevent spam mailers from learning new information about the email recipient.

Despite briefing by the Petitioner on the issues of DSN messages and MTA tests, the Panel's banter about failed emails showed limited comprehension of the matter. Establishing the absence of DSN messages and running MTA tests are not "investigations on Liotti's own computer system" and should not have been deemed so by the Court.

Mr. Liotti's Contemporaneous Writing

The Second Circuit found that Mr. Liotti's letter from April 6, 2005 to the Trial Court in the matter of *Fiaz v. City of New York, et al*, 03-CV-00595, to be proof of receipt. In April, 2005, Mr. Liotti had received a courtesy copy of the *Fiaz* decision via first class mail from the trial court judge. (This courtesy copy of the decision and its envelope were entered into evidence at the hearing in front of Magistrate Lindsay.) Coincidently, the March 30, 2005 ECF in which the *Fiaz* decision was contained, also contained the missing March 30, 2005 *Dempster* decision by Judge Seybert. Upon receipt of the courtesy *Fiaz* decision, Mr. Liotti wrote to Magistrate Matsumoto. He copied the language of the courtesy copy and wrote: "I have received an order electronically from your Chambers...." This misstatement has been unfairly scrutinized by the Circuit Court. Evidence was presented that Mr. Liotti, like many long-time members of the Bar, has never operated a computer and still does not operate a computer. All emails, ECF communications, Westlaw research and online articles are printed for Mr. Liotti by his secretarial staff and placed into his in-box with regular mail and paper correspondence. The Court

need only look to the very email address, maria@tliotti.com to which the ECF was sent to realize the accuracy of that statement.

Erroneously, the Circuit Court disregarded all evidence of the courtesy copy, all sworn statements by Mr. Liotti, and even opposing counsel's statements during oral argument. Mr. Furman, Respondent's Counsel, openly vouched for the veracity of Mr. Liotti's statements, indicating to the Circuit Court that he believed Mr. Liotti had been truthful with the Court in his representation of the courtesy copy.

II. THE SECOND CIRCUIT ERRONEOUSLY UPHELD THE DISTRICT COURT'S APPLICATION OF THE "MAILBOX" RULE TO EMAIL COMMUNICATIONS

Judge Seybert incorrectly applied the Mailbox Rule to email, relying upon the reasoning of *American Boat Company v. Unknown Sunken Barge*, 418 F.3d 910 (8th Cir. 2005), holding that the presumption of notice may be overcome by proving through reliable evidence that it had not been received. Judge Seybert claimed that proof of sending a electronic data results in the presumption of receipt and only failure to send electronic data is sufficient to presume that it was not received, lest hard physical proof to the contrary. The Second Circuit upheld this standard despite numerous problems with this application.

The Mailbox Rule should not apply to email for four reasons. First, letters placed in the mail are sent

via a United States government service, the United States Postal Service. Email is not delivered or communicated by any government service, agency, or other entity. Second, the U.S. Postal Service is subject to government regulation, including what, when, how, where, and to whom items can be delivered. No such regulations exist as to email. It is sent via multiple servers, which host electronic transmission and are not subject to regulation or inspection. Third, there are also specific routes established by which U. S. mail is delivered. Email is not subject to following a specific route. In fact, if email were sent via a specific route, we could identify the exact route the missing ECF message took, rather than just its most likely path. The U.S. Postal Service allows a sender to trace a missing message to discover during which step along its designated journey to the receiver it might have been lost. An email message can only be traced to the server of the address to which the message is sent. That is the equivalent of tracing U.S. mail to a city's Post Office, but never knowing if it was picked up by a mail carrier, sent out for delivery, or placed in the receiver's mailbox. Fourth, unlike a letter or document, email does not physically exist in the same traditional sense as a letter or contract. Email is merely a transmission of dynamic electronic data that can be easily changed, lost, or erased. When email fails, there is no envelope to be found in the "lost letters" department, no postal carrier to testify to delivery, no tracking number to look up, and no return receipt or delivery confirmation receipt to produce.

While the Supreme Court has been asked to consider the validity of laws since its inception, perhaps this is the first time it is being asked to consider the

validity of the Laws of Thermodynamics. Simply stated, the First Law of Thermodynamics deems that energy, or matter, is never created, nor destroyed, but rather, it is just converted. This law does not apply to electronic data. Electronic data can cease to exist without converting into another form of energy or matter.

When applying the First Law of Thermodynamics to communications, the Mailbox Rule has relative merit when applied to traditional letters. At some point, a physical item was placed into a U.S. Postal Box. The item exists in reality. Whether it is delivered or not, it exists in some form in the universe, even if it is the dead letter office, wrong mail box, or trash can. Emails can be deleted with one incorrect character in an address, one bad line of programming code, or one effective spam filter. No evidence of the email will ever exist as it will cease to be as if it never existed.

III. THE SECOND CIRCUIT COURT OF APPEALS ERRONEOUSLY DISREGARDED *ERIE V. THOMPKINS*

The case is one that presents significant issues for lawyers and litigants nationwide concerning proper notice of court rulings. The Second Circuit's decision on *Dempster* has far-reaching implications. Not only does it unceremoniously adopt the application of the Mailbox rule to email communications, but it also undermines the very essence of civil procedure for almost the past century. By looking to case law instead of state statutes in the absence of an Act of Congress, a Court

rule or precedent, the Second Circuit has effectively disregarded and overruled *Erie v. Tompkins*, 304 U.S. 64 (1938). In *Erie*, the Supreme Court provided that in the absence of a federal procedural law, federal courts must follow the applicable State procedure. In the matter of *Dempster v. Dempster, et al.*, New York State civil procedure did not dictate the application of mailbox rule to emailed court orders. Rather, New York Civil Procedure Laws and Rules § 5016 requires Notice of Entry of Court decisions and orders to be sent via mail by the winning side to opposing counsel. No Notice of Entry of the March 30, 2005 decision was sent to Petitioner's counsel. In the absence of a federal statute regarding the entry of ECF decisions, the District Court should have adopted New York State statute; until Congress creates a procedural statute to the contrary. The Circuit failed to follow *Erie v. Thompkins, supra*, and erroneously applied, without precedent, the Mailbox Rule to ECF communications. These issues are of first impression and deserve review by this Court. Parties to litigation should be entitled to actual, hard copy, Notices of Decisions where Affidavits of Service and Notices of Entry are filed. Actual notice is a fundamental principle, deeply imbedded in American jurisprudence. The Second Circuit has superceded that legal bedrock upon which our system has relied for years. The erroneous decision of this proactive bench deserves to be reversed before more litigants are penalized by such outrageous precedents.

CONCLUSION

It is respectfully submitted that this Court grant *certiorari* and reverse the judgment of the Second Circuit because it is clear that the Second Circuit Court of Appeals erred in its adoption of the Mailbox Rule for ECF communications. In addition, the Court should grant the Petitioner's prayer for a *writ of certiorari* and reverse the judgment of the Second Circuit because the Court should have adopted the New York State statute on Notice of Entry until Congress creates a contrary or alternative procedural statute.

Respectfully submitted,

THOMAS F. LIOTTI
Counsel of Record

On the Petition:
Jennifer L. McCann, Esq.
September 17, 2008

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
MADELINE DEMPSTER,

Plaintiff,

-against-

GEORGE G. DEMPSTER, THE LAW FIRM OF SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUNGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARDS FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ., jointly and individually,

Defendants.
----------X

MEMORANDUM AND ORDER

03-CV-1127(JS)

Appearances
for Plaintiff:

Thomas F. Liotti, Esq.
Law Offices of Thomas F. Liotti
600 Old Country Road, Suite 530
Garden City, New York 11530

For Defendants: Shaw, Licitra; Shaw; Schwartz; Livoti, Flint; Amadio, Alesi	A. Michael Furman, Esq. Kaufman, Borgeest & Ryan, LLP 99 Park Avenue, 19th Floor New York, New York 10016
For Defendant Dempster:	George G. Dempster, *pro se* P.O. Box 8065 Garden City, New York 11530-0864

SEYBERT, District Judge:

Plaintiff Madeline Dempster ("Plaintiff") commenced this action against the law firm of Shaw, Licitra, Bohner, Esernio, Schwartz & Pfluger, P.C. ("the law firm"); J. Stanley Shaw, Esq. ("Shaw"); Jeffrey Schwartz, Esq. ("Schwartz"); Frank J. Livoti, Esq. ("Livoti"); Edward Flint, Esq. ("Flint"); Alfred Amadio, Esq. ("Amadio"), and William Alesi, Esq. ("Alesi") (collectively the "Firm Defendants"); and, George G. Dempster ("Dempster"), on March 7, 2003. Plaintiff alleges fraud, aiding and abetting fraud, civil RICO violations, and an action for attorneys' fees. Pending before this Court are a motion, on behalf of the Firm Defendants, to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 9 and a motion, on behalf of Dempster[1], to

---

[1] The Plaintiff argues that Dempster's motion should be denied because it is procedurally flawed. See Liotti

dismiss the Complaint. For the reasons set forth herein, the motions are both GRANTED.

BACKGROUND

Affirm. P. 1-2. However, Dempster filed, on May 5, 2003, a document bearing the caption "Notice of Motion to Dismiss Plaintiff's Complaint." The motion read: "PLEASE TAKE NOTICE, that defendant, George G. Dempster, acting pro se, hereby denied individually and collectively all of Plaintiff's claims, A, B, C, D, and E, and respectfully makes this Motion to the Court to Dismiss Plaintiff's Complaint." Def. Notice of Motion (emphasis in original). The court accepted and docketed this motion. Although Plaintiff later argued that this document was assumed to be in the form of an answer and that it is procedurally flawed, the Court finds no merit in that argument. It is clear from the face of the document that Dempster, acting *pro se*, intended this document to serve as a motion to dismiss. The Court construes *pro se* papers liberally and accepted the motion as filed. The Plaintiff, having received no notification from the Court that the motion was being rejected, should not have unilaterally determined that the document was insufficient to constitute a motion and, if she sought to have the motion denied on procedural grounds, should have petitioned the Court for relief. Moreover, when the Plaintiff did notify the Court, in February, 2004, that she had not responded to the motion because she felt it was not in proper form, the Court gave the Plaintiff the opportunity to respond to the motion.

The facts, as alleged by the Plaintiff, and regarded as true for the purpose of this motion, are as follows. The Plaintiff was divorced from Dempster, after five years of litigation, in a judgment rendered on May 26, 1992 by the Supreme Court of the State of New York, County of Nassau. As a result, the Plaintiff obtained judgments and amended judgments against Dempster totaling $3,477,867.57 which remain unpaid.

On June 27, 1995, while the divorce litigation was pending, the Law Firm formed a Delaware corporation named "Overview Equities, Inc." ("Overview"), using the United States Postal Service and/or an interstate telephone carrier to do so. According tot he Firm Defendants, they formed Overview at the direction of Peter McGann, a former associate of Dempster and a non-party to this action. On or about June 29, 1995, Dempster transferred title to the marital residence, located at 156 Cove Neck Road, Oyster Bay, New York to Overview. Schwartz, of the Law Firm, prepared the deed and it was recorded on June 30, 1995. The deed showed no consideration for the transfer. On the 29th of that month, at the direction of McGann and Dempster, Schwartz prepared a lease from Overview to Dempster for the marital residence. Under the lease terms, Dempster was to pay a monthly rent that consisted of all expenses related to the property including, but not limited to, maintenance, insurance, property taxes, and mortgage payments. The Plaintiff alleges that such rent was never collected by Overview nor was there any action taken to enforce collection of the rent. The failure to make such payments caused the

residence to go into default.

On August 4, 1995, Overview executed an Affidavit of Confession of Judgment in favor of Island Helicopter Leasing Corporation ("Island") in the amount of $1,181,364.50. The Confession of Judgment was prepared by Schwartz. Island had been dissolved by the Secretary of State of the State of New York approximately three years earlier. The Law Firm filed this Confession of Judgment with the Nassau County Clerk's Office on August 4, 1995. On that same day, McGann, as President of Overview, executed an Affidavit of Confession of Judgment, on behalf of Overview, in favor of Rio Manufacturing of Delaware, Inc. ("Rio") in the amount of $291,998.24. This Confession was also prepared by Schwartz and filed with the Nassau County Clerk's Office on August 4, 1995. Rio had been dissolved approximately 24 years earlier by the Delaware Secretary of State. It is alleged that the preparation and filing of these Confessions of Judgment was fraudulent and that these frauds were perpetrated using the U.S. Postal Service, the Nassau County Clerk's Office, and wire communications, for the purpose of encumbering the marital residence and denying the Plaintiff her share of the assets. By way of a Forbearance agreement between Dempster and Citibank in 1998, Dempster further encumbered the Marital Residence with two mortgages totaling approximately $1,700,000.

In July 1997, the Plaintiff filed a fraudulent conveyance action in Nassau County naming Dempster, Overview, Island and Rio as defendants. While this action was ongoing, the Law Firm

represented Overview in its Chapter 11 bankruptcy action in the Eastern District of New York in April 199[illegible]. Eventually, in the state fraudulent conveyance action, the Plaintiff was granted summary judgment and the defendants are currently appealing the decision, and the Bankruptcy action was dismissed.

DISCUSSION

On this motion to dismiss under Rule 12(b), the Court must view all facts alleged in the Complaint in a light most favorable to the Plaintiff, see, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), and should only grant the motion if relief cannot be granted under any set of circumstances that could potentially be proved consistent wit the allegations. See id. At 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

I. RICO CLAIM

"To state a RICO claim, a plaintiff must plead '(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity.'" Anatian v. Coutss Bank Ltd., 193 F.3d 85, 88 (2d Cir. 1999) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)). A plaintiff must also plead injury to business or property as a result of the RICO violation. See id. Having reviewed the allegations in the Complaint, the Court finds that the Plaintiff has failed to properly plead a RICO violation and, as such, the RICO claim is properly DISMISSED.

A. RICO Enterprise

A RICO enterprise is defined as "any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961 (4). "The enterprise 'is an entity, a group of persons associated together for a common purpose of engaging in a course of conduct." DeFalco v. Bernas, 244 F.3d 286, 307 (2d Cir. 2001) (quoting U.S. v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)). Evidence of an ongoing organization whose members continue to operate as a unit is sufficient to prove an enterprise. Id. (citing Turkette, 452 U.S. at 583; Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc., 879 F.2d 10, 15 (2d Cir. 1989)). Additionally, the complaint need only meet the notice pleading requirements of Federal Rule of Civil Procedure 8 with respect to the enterprise requirement. See In Re Sumitomo Copper Litig., 104 F.Supp.2d 314, 319 (S.D.N.Y. 2000) (citing Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech. Inc., 886 F.Supp. 1134, 1144-45 (S.D.N.Y. 1995); Azurite Corp. V. Amster & Co., 730 F.Supp. 571 (S.D.N.Y. 1990)).

The Plaintiff alleges that Dempster, together with the Firm Defendants, constituted an enterprise with the purpose of fraudulently depriving her of her equitable distribution share of marital assets. See Compl. At ¶¶18, 134. As evidence of this alleged enterprise, the Plaintiff alleges that the Law Firm represented Dempster in both personal and corporate capacities and that the Law Firm paid Dempster's

contempt fees. See id. at ¶¶119, 138. The Court finds that these allegations are insufficient to plead that a RICO enterprise existed. What is lacking here is any allegation that would support the inference that the Firm Defendants were working with Dempster for a common purpose, or were engaged in a mutual course of conduct. The allegations in the Complaint support the inference that Dempster alone was operating with a fraudulent purpose, however a single person cannot constitute an enterprise. See Lavian v. Haghnazari, 884 F.Supp. 670, 684 (E.D.N.Y. 1995) ("a defendant may not be both a 'person' and an 'enterprise'"). As such, the Court finds that the Plaintiff has failed to allege the existence of a RICO enterprise and, as such, the RICO claim is properly DISMISSED.

B. Participate

Even assuming that the allegations in the Complaint are sufficient to satisfy the Plaintiff's burden of pleading the existence of a RICO enterprise, the RICO claim is still properly dismissed as against the Firm Defendants because the Complaint does not establish that the Firm Defendants participated in the alleged racketeering activity. The Supreme Court, in Reyes v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), considered the issue of RICO liability of outside professionals providing services. In Reyes, the Court established that a professional will be liable for a RICO violation only if they participate in the operation of management of the enterprise itself. See id at 178. It is clear that merely providing services to the enterprise is not "participating" in the enterprise to the extent necessary to establish RICO

liability. Mandanes v. Mandanes, 981 F.Supp. 241, 256-57 (S.D.N.Y. 1997) (citations omitted). Further, the fact that a lawyer, or other professional, does not profit other than through the receipt of ordinary fees for their professional services, is very significant in determining whether the professional can be liable for participating in a pattern of racketeering activity. See Id. at 256; Biofeedtrac, Inc. V. Kolinor Optical Enters. & Consultants, S.R.L., 832 F.Supp.585, 591 (E.D.N.Y. 1993).

Plaintiff's Complaint does not allege anything more than the provision of routine legal services to Dempster and his corporate entities. See Compl. at ¶¶ 20-40. The Court finds that the Complaint is devoid of any allegation that would lead to the reasonable inference that the Firm Defendants were active, or even knowingly passive, participants in racketeering activity. Even if the Plaintiff had alleged that the Firm Defendants had gone beyond providing legal services and actually concealed the fraudulent activities of Dempster, the Complaint would still be insufficient. Allegations that an attorney concealed the fraudulent activities of an enterprise, or even recommend that an enterprise engage in fraudulent behavior, are insufficient to establish RICO liability for an attorney. See id. At 257 (citations omitted). As such, it is clear that the Plaintiff has failed to allege that the Firm Defendants participated in a pattern of racketeering activity and the RICO claim against them is, therefore, properly DISMISSED.

C. Racketeering Activity

Finally, the Court finds that the RICO claim is properly dismissed as against all of the Defendants because the Plaintiff has failed to adequately plead that the Defendants engaged in racketeering activity. Under RICO, "'[r]acketeering activity' is defined . . . to mean 'any act or threat involving specified state-law crimes, any 'act' indictable under various specified federal statutes, and certain federal 'offenses' . . ." Northwestern Bell Tel. Co., 492 U.S. at 232 (quoting 18 U.S.C. §1961(1)). The state-law crimes that are considered racketeering activities under 1961(1) include "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . and punishable by imprisonment for more than one year." 18 U.S.C. §1961(1)(a).

In this case, the Plaintiff alleges that the Defendants committed mail and wire fraud, in violation of 18 U.S.C. §§1341 and 1343. Under 18 U.S.C. §1961(1), mail fraud and wire fraud both constitute predicate acts. Arizona Premium Finance, Inc. V. Bielli, 77 F.Supp.2d 341, 346 (E.D.N.Y. 1999); see also In re Sumitomo Copper Litig., 104 F.Supp.2d 314, 319 (S.D.N.Y. 2000). "In pleading a violation of the mail and wire fraud statutes, Rule 9(b) of the Federal Rules of Civil Procedure must be satisfied." Id. Rule 9(b) provides in relevant part: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). This heightened pleading standard is "especially important in RICO cases because of the harm to a person's reputation that

allegations or 'racketeering' may do and the in terrorem effect of RICO's treble damages provision." In re Crazy Eddie Sec. Litig., 714 F.Supp. 1285, 1292 (E.D.N.Y. 1989); see also Sumitomo, 104 F.Supp.2d at 319.

To adequately plead the predicate acts of mail and wire fraud under 18 U.S.C. §§1341 and 1343 a plaintiff "must allege the time, place, speaker, and sometimes even the content of the alleged misrepresentation." Ouaknine v. MacFarlane, 897 F.2d 75, 79 (2d Cir. 1990). Further, "there must be some factual basis for conclusory allegations of intent." Id. Whether the "'information is exclusively in the possession of those participating in the fraud'" is an important consideration in determining the level of particularity the plaintiff is required to plead. First International Advisors Corp. V. Wolff, 956 F.Supp. 480, 485 (S.D.N.Y. 1997). The plaintiff also must show "(1) the existence of a scheme to defraud; (2) the defendant's knowledge or intentional participation in the scheme; and (3) the use of interstate mails or wires to further the fraudulent scheme." Bologna v. Allstate Ins. Co., 138 F.Supp.2d 310, 321 (E.D.N.Y. 2001) (citing S.O.K.F.C., Inc. V. Bell Atlantic TriCon Leasing Corp., 84 F.3d 629, 633 (2d Cir. 1996)).

The Plaintiff's Complaint fails to meet these standards. While the Complaint does specify the time, place and speaker, it fails to provide any facts from which the Court can infer fraudulent intent. Simply recounting, as the Complaint does, the steps taken by Defendants to form a corporation, transfer title of real property, and prepare confessions of judgment, even

when taken in a light most favorable to the Plaintiff, does not amount to an inference of fraudulent intent. At best, the allegations in the Complaint would support a fraud claim against Dempster, however, there is no allegation that would allow the Court to draw the inference that the Firm Defendants operated with a fraudulent intent.

The case of Wiener v. Napoli, 760 F.Supp. 278 (E.D.N.Y. 1991), is similar to the case at bar and, therefore, particularly instructive. In Wiener the defendant was an attorney charged with RICO violations. The Wiener plaintiff alleged that the attorney-defendant, in transmitting various legal documents, committed mail and wire fraud. The court dismissed the RICO count because the plaintiff failed to meet the burden of Rule 9(b). The complaint alleged a general motive of the alleged fraud, to deprive a widow of fees due her husband's estate, and an opportunity to commit the fraud, however, the complaint failed in that it did not identify any fraudulent statements or misrepresentations within the routine legal documents that were transmitted. Simply pointing to innocuous business and legal documents, without more, cannot support a finding of fraudulent intent. Id. At 284-85 (citing O'Malley v. N.Y. City Transit Auth., 896 F.2d 704, 707 (2d Cir. 1990); Atlantic Gypsum Co. V. Lloyds Int'l Corp., 753 F.Supp. 505, 513 (S.D.N.Y. 1990)). For this reason, the Plaintiff's Complaint is deficient, and the Plaintiff's sweeping accusations that the legal documents were used to perpetrate fraud does not save the Complaint. See Bologna, 138 F.Supp.2d at 322 (holding that simply regurgitating the generic

requirements of the mail and wire fraud statutes is not sufficient to survive a 12(b)(6) motion); see also Wasserman v. Maimonides Med. Ctr., 970 F.Supp. 183, 190 (E.D.N.Y. 1997) (complaint which alleged general purpose of fraudulent scheme, means of carrying out scheme, and identified three letters sent via United States Mail in furtherance of scheme, was dismissed for failure to meet the particularity requirements of Rule 9(b) because it did not detail what specific statements or misrepresentations were made in committing the fraud).

The Wiener court also distinguished the Second Circuit's holding in Quaknine, 897 F.2d at 80-81, where the Circuit found that allegations that an attorney-defendant committed mail and wire fraud in transmitting legal documents were sufficient. In Quaknine, the allegations pointed to specific fraudulent statements contained in a partnership agreement and the Circuit found that the specificity was sufficient to withstand a Rule 9(b) motion. The Wiener court was able to distinguish Quaknine because the Wiener plaintiff failed to point to any specific fraudulent statements or misrepresentations. The Complaint in this case is similarly deficient and, as such, Quaknine is similarly distinguished from the case at bar.

Plaintiff submits that this case is similar to Calabrese v. CSC Holdings, Inc., 283 F.Supp.2d 797 (E.D.N.Y. 2003), and that, therefore, the Court should deny dismissal of the Complaint, as it did there. The Plaintiff's reliance on Calabrese is misplaced. The allegations in Calabrese pointed to specific fraudulent

and misleading statements in letters sent to customers. The requisite intent was easily inferred from such statements. Nowhere in this Plaintiff's more than one-hundred paragraph Complaint can the Court find an allegation that any of the routine documents contained false or misleading statements which would allow the Court to draw a "'strong inference' of fraudulent intent." Quaknine, 897 F.2d at 80 (quoting Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987)). The documents are all routine legal documents and, other than the Plaintiff's conclusory allegations that they are fraudulent, there is no evidence that the Firm Defendants had knowledge of, or intentionally participated, in any fraud.

It is also noted that the Plaintiff had in her possession, or could have had in her possession, nearly all of the documents she alleged to be fraudulent. Most of these documents were attached to the Complaint or were available to the Plaintiff as a matter of public record. As noted earlier, the fact that this information was not solely in the possession of those alleged to be perpetrating the fraud is sufficient basis to require that the Plaintiff be more specific in alleging the fraudulent statements within those documents. See First Interregional, 956 F.Supp. At 485.

For all of these reasons, the Court finds that the allegations in the Complaint do not adequately plead mail or wire fraud. As such, the Plaintiff has failed to plead that the Defendants engaged in a pattern of racketeering activity. The Plaintiff alternatively

argues that the First Defendants violated various Disciplinary Rules and that those violations constitute predicate acts. However, "[t]hose offenses which may serve as predicate acts for a RICO claim are exclusively listed in §1961." Red Ball Interior Demolition Corp. V. Palmadessa, 874 F.Supp. 576, 586 (S.D.N.Y. 1995) (citing 18 U.S.C. §1961(1)). Nowhere in 18 U.S.C. §1961 are violations of attorney Disciplinary Rules listed as a predicate act. As such, these alleged violations cannot satisfy the Plaintiff's burden of pleading that the Defendants engaged in a pattern of racketeering activity and, for that reason, the RICO claim is properly DISMISSED.

II. STATE LAW CLAIMS

In light of the dismissal of all federal claims, the Court declines to exercise jurisdiction over the state law claims. A district court may decline to exercise jurisdiction if it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. §1367(c)(3); see also Nerney v. Valente & Sons Repair Shop, 66 F.3d 25, 30 (2d Cir. 1995). In declining to exercise jurisdiction over these claims, the Court has considered its decision in light of judicial economy, convenience, and fairness to the parties. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-727, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Therefore, Plaintiff's remaining state law claims are properly DISMISSED.

CONCLUSION

For the reasons stated herein, the Defendants' motions to dismiss are GRANTED with respect to all claims. The Complaint is DISMISSED, without prejudice. The Plaintiff is hereby GRANTED leave to file an Amended Complaint within thirty days of the date of this Order.

SO ORDERED

_____

Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
March 31, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
MADELINE DEMPSTER,

Plaintiff,

-against-

GEORGE G. DEMPSTER, THE LAW FIRM OF SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUNGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARD FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ., jointly and individually,

Defendants.
----------X

MEMORANDUM AND ORDER

03-CV-1127(JS)

Appearances
for Plaintiff: Thomas F. Liotti, Esq.
Law Offices of Thomas F. Liotti
600 Old Country Road, Suite 530
Garden City, New York 11530

For Defendants: Shaw, Licitra; Shaw; Schwartz; Livoti, Flint; Amadio, Alesi
A. Michael Furman, Esq.
Kaufman, Borgeest & Ryan, LLP
99 Park Avenue, 19th Floor
New York, New York 10016

George Dempster George G. Dempster, *pro se*
P.O. Box 8065
Garden City, New York 11530-0864

SEYBERT, District Judge:

On May 12, 2004, Plaintiff Madeline Dempster ("Plaintiff") filed her Amended Complaint against the law firm of Shaw, Licitra, Bohner, Esernio, Schwartz & Pfluger, P.C. ("the Law Firm"; J. Stanley Shaw, Esq. ("Shaw"); Jeffrey Schwartz, Esq. ("Schwartz"); Frank J. Livoti, Esq. ("Livoti"); Edward Flint, Esq. ("Flint"); Alfred Amadio, Esq. ("Amadio"), and William Alesi, Esq.[1] ("Alesi") (collectively the "Firm Defendants"); and, George G. Dempster ("Dempster"). The Amended Complaint alleges civil RICO violations, and state law claims for claims for fraud and siding aiding and abetting fraud. Additionally, Plaintiff seeks to recover attorneys' fees.

Pending before the Court are: (1) the Law Firm Defendants' motion to dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 9(a); (2) the Law Firm Defendants' motion for an order, pursuant to Federal Rule of Civil Procedure 11(b), for sanctions and attorney's fees, and granting costs; (3) Dempster's motion to dismiss the Amended Complaint and for sanctions; and (4) Plaintiff's motion, pursuant to Rule 6(b), requesting

---

[1] Pursuant to this Court's Order, dated October 28, 2001 Plaintiff stipulated to the dismissal of Defendant William Alesi from the instant action.

that the Court accept untimely filed opposition papers. For the reasons set forth herein, the Law Firm Defendants' motion to dismiss the Amended Complaint is GRANTED; the Law Firm Defendants' motion for sanctions and attorneys fees is DENIED; Defendant Dempster's motion to dismiss is GRANTED; and Plaintiff's motion pursuant to Rule 6(b) is DENIED.

BACKGROUND

The contours of the Amended Complaint are, once again, difficult to decipher. The overall theme, however, is readily apparent. On May 26, 1992, after five years of litigation, the Supreme Court of the State of New York, Nassau County, rendered a judgment of divorce as to Plaintiff and Defendant Dempster. (Am. Compl. ¶ 17.) As a result of the divorce, Plaintiff obtained judgments and amended judgments, as of March 24, 1998, totaling $3,477,867.57. (Am. Compl. ¶18, 152.) This figure included Plaintiff's entitlement to equitable distribution.

On March 7, 2003, Plaintiff commenced this action alleging that Dempster and the Law Firm Defendants engaged in "fraudulent and unlawful conduct that was directed at depriving Plaintiff of property that she was entitled to under New York's equitable distribution law, and preventing Plaintiff from collecting judgments." (Am. Compl. ¶19.) The alleged fraudulent conduct consisted of: (1) a fraudulent real estate transfer of the marital residence involving the creation of a shell entity, Overview Equities ("Overview"); (2) the preparation of fraudulent confessions of judgment in favor of two

entities, Island Helicopter Leasing Corporation ("Island Helicopter"), and Rio Manufacturing of Delaware, Inc. ("Rio") so as to encumber the marital residence; (3) the preparation of a fraudulent lease; and (4) the filing of a bankruptcy petition. (Am. Compl. ¶¶62, 66, 22-23, 93-95, 90-98, 100-110, 111-128, 131-32, 155-57, 171-72.)

In 1997, Plaintiff commenced an action in the Supreme Court of the State of New York in the County of Nassau styled Madeline Dempster v. Overview Equities, Island Helicopter Leasing Corporation, Rio Manufacturing of Delaware, Inc. And George G. Dempster ("Fraudulent Conveyance Action"). (Am. Compl. ¶43.) Supreme Court Judge Peter Skelos found that the aforementioned conduct amounted to a fraudulent transfer of the marital residence. (Am. Comp. ¶45-46.) This determination was affirmed by the New York Appellate Division in the Second Department in Madeline Dempster v. Overview Equities, Inc., et. al. (Am. Compl. §47-48.)

PROCEDURAL HISTORY

On March 31, 2004, this Court entered an Order dismissing Plaintiff's RICO claims against Dempster and the Law Firm Defendants and declining to exercise supplemental jurisdiction over Plaintiff's state law claims. The Court determined that Plaintiff's RICO claims were deficient because they failed to adequately allege: (1) the existence of a RICO enterprise; (2) sufficient participation by the Law Firm Defendants; and (3) sufficient predicate acts constituting a pattern of racketeering activity. Having

dismissed Plaintiff's federal claims, the court declined to exercise subject matter jurisdiction over Plaintiff's state law claims. See March 2004 Order.

On May 12, 2004, Plaintiff filed an Amended Complaint, ostensibly remedying the defects in the earlier pleading. The Amended Complaint contains several additional factual allegations indicating that the "Law Firm" and the "individual defendants" knew or had constructive notice of Dempster's fraudulent scheme to deprive Plaintiff of marital assets. The Amended Complaint alleges that Dempster informed the Law Firm of his intent to deprive Plaintiff of marital assets and that the Law Firm helped craft a "legal way" to achieve this goal. (Am. ¶67.)

The Law Firm Defendants content that the Amended Complaint fails to remedy the defects of its predecessor, and have, once again, moved to dismiss the Amended Complaint pursuant to Rules 12(b)(6) and 12(b)(1). In the alternative, the Law Firm Defendants move to dismiss Plaintiff's fraud-based claims pursuant to Rule 9(a). Additionally, the Law Firm Defendants have moved for attorneys fees and sanctions pursuant to Rule 11. Dempster, pro se, has also filed a motion to dismiss the Amended Complaint and for sanctions.

Plaintiff's Motion Pursuant to Rule 6(b)

The Court notes that Plaintiff has failed to timely file any opposition to the pending motions. Plaintiff has, however, filed a motion, pursuant to Rule 6(b), requesting that the Court, nunc pro tunc, accept

Plaintiff's opposition. This motion is DENIED.

The Court previously denied the same application, although not precisely framed as a Rule 6(b) motion, in response to an October 5, 2005 letter request from Plaintiff's Counsel. The October 5, 2005 letter was sent over one month after a previously extended filing deadline had passed. The letter requested an enlargement of Plaintiff's time to file opposition papers and contained the following reasons for Plaintiff's counsel's failure to previously seek an additional extension: "a lingering cold," other trial engagements, and a "request for clarification" of an Order by this Court dated August 4, 2004 that a young associate, who had since been discharged, failed to adequately resolve. In an Order dated October 8, 2004, this Court pointed out:

> On August 16, 2004, this Court granted Plaintiff's application to extend Plaintiff's time for filing opposition papers to Defendants' motions to dismiss the Amended Complaint and for sanctions. In granting the August 16, 2004, application, this Court extended Plaintiff's time to timely respond to August 23, 2004, and noted, "No further extensions will be granted." Over one month after the extended deadline has passed, Plaintiff requests additional time to file opposition papers. Because Plaintiff has failed to offer good cause for Plaintiff's failure to meet the extended deadline, the request is DENIED.

The Court finds no reason to depart from the October 8, 2004 Order. Plaintiff's counsel requested and received an extension pursuant to this Court's August 4, 2004 Order, and was granted a second extension in response to an August 16, 2004 request. Based on the Court's grant of Plaintiff's August 16, 2004 request, Plaintiff had until August 23, 2004 to timely file an opposition. If Plaintiff wanted to make an additional application for an extension of time to be relieved of the August 23, 2004 deadline, Plaintiff could have done so prior to the expiration of that deadline. Moreover, even if (as newly averred in Plaintiff's affidavit in support of Plaintiff's Rule 6(b) motion) Plaintiff's counsel had not received notice of the August 16, 2004 Order until after the proposed deadline expired, Plaintiff's counsel should have taken some action in close temporal proximity to when he received the notice of the extension. Instead, Plaintiff's counsel, relying on the inadequacies of a since discharged "young associate", submitted an application for an additional extension more than one month after the already extended deadline.

Then, despite the fact that the additional extension was denied, Plaintiff's counsel filed opposition papers anyway, and, approximately one month later, filed a motion to extend the time for filing under rule 6(b).[2] Plaintiff's request for enlargement

---

[2] Plaintiff's counsel avers that "prior to receiving this Court's declination of permission to enlarge the time to file answering papers I had already electronically filed plaintiff's oposition with

under Rule 6(b) cites as excusable neglect the same reasons provided in the October 5, 2004 request, and adds additional reasons, including the illness of Plaintiff's counsel's parents, as a reason in favor of enlarging Plaintiff's time to respond. The Court reiterates that, in the 6(b) application, Plaintiff's counsel changes the date of the Court's Order that allegedly required clarification from August 4, 2004, to August 16, 2004. Under these circumstances, the Court refuses to find excusable neglect.

Accordingly, the Court adheres to its prior ruling, and DENIES Plaintiff's motion pursuant to Rule 6(b). See Fed.R.Civ.P. 6(b). Connell v. City of New York, 230 F.Supp.2d 432, 437 (S.D.N.Y. 2002) ("enlargements of time pursuant to Rule 6(b) are within the sound discretion of the Court").

DISCUSSION

I. Standard of Review

A district court should grant a motion to dismiss

---

the Court." (Aff in Support of Rule 6(b)(2) App. ¶8.) However, the Eastern District of New York's Electronic Case Filing System ("ECF") indicates that Plaintiff was notified, electronically, of the Court's denial of his application on October 8, 2004 and Plaintiff's opposition papers were electronically filed on October 14, 2004. (No. 03-CV-1127, Docket Sheet, Entry Nos. 54-57 (incl. Endorsed Order re: Entry No. 54.))

under Rule 12b(6) only if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. V. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50, 109 S.Ct. 2893, 106 L. Ed.2d 195 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L. Ed.2d 59 (1984)). In applying this standard, a district court must "read the facts alleged in the complaint in the light most favorable" to the plaintiff and accept these factual allegations as true. H.J. Inc., 492 U.S. at 249. See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 165, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (citing the Federal Rules' liberal system of notice pleading).

The court's duty "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000); see also Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The appropriate inquiry, therefore, is not whether a plaintiff's claims are ultimately meritorious, but whether the plaintiff is entitled to offer evidence to support them. See Ricciutti v. New York City Transit Auth., 941 F.2d 119, 123-24 (2d Cir. 1991) (plaintiff is not compelled to prove his or her case at the pleading stage).

Additionally, a plaintiff is not required to set out in detail the fact upon which he or she bases a claim. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). A plaintiff need only give a statement of his or her claim that will give the

defendant "fair notice of what the . . . claim is and the grounds upon which it rests." Id. Therefore, where a complaint is filed that charges each element necessary to recover, the dismissal of the case for failure to set out evidential facts can seldom be warranted. See, U.S. v. Employment Plasterers' Ass'n., 347 U.S. 186, 189, 74 S.Ct. 452, 98 L.Ed. 618 (1954). Allegations that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains, however, are meaningless as a practical matter and, as a matter of law, are insufficient to state a claim. See Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987).

II. Civil RICO Claims

In their motion to dismiss, Defendants raise several inadequacies found in the Amended Complaint. Most notably, the Law Defendants point out that Plaintiff's RICO claims are time-barred.[3] The Court agrees.

The statute of limitations governing civil RICO

---

[3] In is motion to dismiss, pro se Defendant Dempster submits that the Amended Complaint "does not at all attain the criteria of the RICO statute." Because the Court construes the papers of pro se litigants liberally, the Court presumes that Defendant Dempster also objects to the timeliness of the Amended Complaint. See Cardenas-Argudo v. Goord, No. 04-CV-2348, 2005 WL 578318 at *1 (E.D.N.Y. March 11, 2005).

claims is four years. See Merrill Lynch P'ship Litig. v. Merrill Lynch & Co., Inc., 154 F.3d 56, 58 (2d Cir. 1998); In re Integrated Res., Inc. Real Estate Ltd. P'ships Sec. Litig., 851 F.Supp. 556, 567 (S.D.N.Y. 1994). "The limitations period begins to run from the time [p]laintiffs knew or should have known of their alleged RICO injury or claim." Integrated Res., 851 F.Supp. At 567. Where, as here, a plaintiff alleges a fraud-based RICO action, "[t]he limitations period . . . commences when [p]laintiffs are placed on notice of facts which should arouse suspicion." Id.

Plaintiff has failed to allege any fraudulent conduct by the Law Firm Defendants within the limitations period. Plaintiff filed the original Complaint on March 3, 2003. Thus, in order to be timely, Plaintiff must have alleged conduct constituting a RICO violation after March 3, 1999 or otherwise alleged facts indicating a lack of awareness as to her injury or the fraudulent conduct. Here, all transactions with respect to the fraudulent transfer of assets occurred in 1995. Moreover, Plaintiff was well aware of any injury arising fro these transactions in 1997, as evidenced by the fraudulent conveyance action she commenced in New York Supreme Court. Indeed, the only instance of conduct that could conceivably render Plaintiff's action timely is the April 1999 bankruptcy petition of Overview. However, Plaintiff does not, even under the most liberal reading of the Amended Complaint, allege how the bankruptcy proceeding relates to the scheme to deprive her of marital assets - the purpose of the alleged RICO enterprise. Further, "[t]he time from which the statute of limitations begins to run is not the time at which a

plaintiff becomes aware of all of the various aspects of the alleged fraud, but rather the statute runs from the time at which the plaintiff should have discovered the general fraudulent scheme." Id., 851 F.Supp. At 568 (internal quotations, citations omitted).

Accordingly, Plaintiff's RICO claims are hereby DISMISSED.

IV. State Law Claims

In light of the dismissal of Plaintiff's RICO claims, the Court, once again, declines to exercise jurisdiction over the state law claims.

A district court may decline to exercise jurisdiction if it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. §1367(c)(3); see also Nerney v. Valente & Sons Repair Shop, 66 F.3d 25, 30 (2d Cir. 1995). In declining to exercise jurisdiction over these claims, the Court has considered its decision in light of judicial economy, convenience, and fairness to the parties. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-727, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The Court further notes that "[i]n most circumstances, a district court should decline supplemental jurisdiction if all federal claims have been dismissed at the pleading stage." Lerner v. Fleet Bank N.A., 318 F.3d 113, 130 (2d Cir. 2003).[4]

---

[4] The Court notes that it is also questionable whether Plaintiff's fraud claims are timely, as a

Accordingly, Plaintiff's remaining state law claims are DISMISSED, without prejudice.

V. The Defendants' Motion for Attorney Fees and Sanctions

The Defendants request an order, pursuant to Federal Rule of Civil Procedure 11(b), for sanctions and attorneys' fees on the basis that: (a) the Amended Complaint was filed in bad faith; (b) the Amended Complaint is frivolous and unwarranted; and (c) the Amended Complaint lacks evidentiary support. The Law Firm Defendants have also requested an award of costs.

It is well established that "[t]he decision whether to impose a sanction for a Rule 11(b) violation is . . . committed to the district court's discretion." Perez v. Posse Comitatus, 373 F.3d 321, 325 (2d Cir. 2004). Even where the Court determines the existence of a Rule 11(b) violation, a district court is not required to impose sanctions. See id.

Contrary to Defendants' assertions, the Court does not find that Plaintiff engaged in sanctionable conduct. Plaintiff was granted leave and filed the

---

cause of action for fraud has a six-year statute of limitations from the date of the wrongful act, or a two-year limitations period from the date of discovery of the fraud. See Bloomfield v. Bloomfield, 280 A.D.2d 320, 321, 721 N.Y.S.2d 15 (2d Dep't 2001).

Amended Complaint, attempting to remedy the Complaint's defects. The allegations included in the Amended Complaint are serious, but are, as described above, untimely. Quite simply, the Court cannot agree with the Law Firm Defendants that the filing of the Amended Complaint was frivolous, unwarranted, lacks evidentiary support or was done in bad faith, such that sanctions or an award of attorneys fees would be appropriate. See U.S. Fire Ins. Co. V. United Limousine Serv., 303 F.Supp. 432, 454-55 (S.D.N.Y. 2004).

Accordingly, the Defendants' motion for sanctions and attorneys fees pursuant to Rule 11(b) is DENIED.

The Court adds that Law Firm Defendants, as a prevailing party in their motion to dismiss the Amended Complaint, are entitled to costs, as a matter of course, pursuant to Federal Rule of Civil Procedure 54(d).

CONCLUSION

For the reasons stated herein, Dempster's and the Law Firm Defendants' motion to dismiss the Amended Complaint are GRANTED. Plaintiff's RICO claims are DISMISSED, with prejudice. Plaintiff's state law claims are DISMISSED, without prejudice.

The Clerk of the Court is directed to mark this matter as CLOSED.

SO ORDERED

_____

Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
March 30, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
MADELINE DEMPSTER,

Plaintiff,

-against-

GEORGE G. DEMPSTER, THE LAW FIRM OF SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUNGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARD FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ., jointly and individually,

Defendants.
----------X

MEMORANDUM AND ORDER

03-CV-1127(JS)

Appearances
for Plaintiff: Thomas F. Liotti, Esq.
Law Offices of Thomas F. Liotti
600 Old Country Road, Suite 530
Garden City, New York 11530

For Defendants: Shaw, Licitra; Shaw; Schwartz; Livoti, Flint; A. Michael Furman, Esq.
Kaufman, Borgeest & Ryan, LLP
99 Park Avenue, 19th Floor
New York, New York 10016

Amadio, Alesi

George Dempster George G. Dempster, *pro se*
P.O. Box 8065
Garden City, New York 11530-0864

SEYBERT, District Judge:

On March 30, 2005, this Court issued an Order dismissing Plaintiff Madeline Dempster's ("Plaintiff") claims against Defendants Shaw, Licitra, Bohner, Esernio, Schwartz & Pfluger, P.C. ("the Law Firm"); J. Stanley Shaw, Esq. ("Shaw"); Jeffrey Schwartz, Esq. ("Schwartz"); Frank J. Livoti, Esq. ("Livoti"); Edward Flint, Esq. ("Flint"); Alfred Amadio, Esq. ("Amadio"), (collectively the "Firm Defendants"); William Alesi, Esq. and, George G. Dempster ("Dempster"). Pending before the Court is Plaintiff's motion, pursuant to Federal Rules of Appellate Procedure 4(a)(5) and 4(a)(6), for the Court to enlarge Plaintiff's time to file a notice of appeal. For the reasons set forth herein, the Court orders that an evidentiary hearing be conducted to resolve the issue of when Plaintiff received notice of the entry of a judgment dismissing Plaintiff's claims.

BACKGROUND

The substantive facts underlying this action are set forth in this Court's March 30, 2005 Order ("March Order"). The following is a recitation of only the facts pertinent to the instant motion.

On March 30, 2005, this Court issued an Order

dismissing Plaintiff's RICO claims as barred by the statute of limitations. Because it was Plaintiff's second failed attempt at pleading, and because of the nature of the deficiencies in Plaintiff's RICO claims, the Court dismissed Plaintiff's RICO claims with prejudice. The Court dismissed Plaintiff's remaining state law claims without prejudice.

The March Order was docketed, posted to the Eastern District of New York's Electronic Case Filing System ("ECF") on March 30, 2005. The Order of Judgment ("Judgment") was entered in similar fashion on the following day, March 31, 2005. The docket indicates that Plaintiff's counsel's office received notice via electronic mail ("e-mail") of both the entry of the March Order and the entry of the Judgment.

Plaintiff's counsel avers that he never received any e-mail notification of either the issuance of the Order or the entry of the Judgment. Instead, Plaintiff's counsel stats that he first learned of the ruling on August 18, 2005, when he received a letter from his client, adivising him that an order had been entered in this action. He claims that, "[u]ntil August 8 [sic], 2005 [his] office never received word of the decision." (Liotti Aff. ¶4.) Plaintiff's counsel states that after learning of the entry of the March Order, he promptly telephoned this Court and filed the instant motion.

In support of the instant application, Plaintiff's counsel had submitted his own affirmation and the affidavits of two employees. One of the employees is an administrative assistant typically in charge of

monitoring the receipt of ECF e-mails in Plaintiff's counsel's office. The administrative assistant was out of the office with a physical malady between February an May of 2005, and thus would not have been in the office when notification of the order and judgment were sent. The other employee, a paralegal charged with monitoring the office's electronic correspondence in the administrative assistant's absence, states that she checked for e-mail notifications during the pertinent period, but did not see any messages concerning this action.

Based upon a purported lack of receipt of notice of the March Order, Plaintiff requests that the Court either extend her time to file a notice of appeal, or re-open her time for filing a notice of appeal pursuant to Federal Rules of Appellate Procedure 4(a)(5) and 4(a)(6). The Law Firm Defendants oppose the instant motion, contending that Plaintiff has failed to establish lack of receipt of notice of the judgment, and that Plaintiff has otherwise failed to provide any basis to extend the time to file an appeal. In addition, the Law Firm Defendants argue that any appeal would be baseless.

DISCUSSION

I. The Requirement of Federal Rule of Appellate Procedure 4

The time for filing a notice of appeal in a civil case is governed by Rule 4 of the Federal Rules of Appellate Procedure. See Fed.R.Civ.P. 4(a)(1). Rule 4(a)(1) provides that "the notice of appeal . . . must be

filed with the district clerk within 30 days after the judgment or order appealed from is entered." Id. The requirements of Rule 4 are "mandatory and jurisdictional." Thus, a district court's authority to extend the time for filing a notice of appeal is "severely circumscribed." Endicott Johnson Corp. v. Liberty Mutual Insur. Co., 116 F.3d 53, 56 (2d Cir. 1997); see also, Neishlos v. City of New York, No. 00-CV-914, 2003 WL 22990083 at *1 (S.D.N.Y. Dec. 18, 2003).

Rule 4(a) contains two provisions permitting a district court to extend Rule 4(a)(1)'s 30-day mandatory and jurisdictional requirement. First, Rule 4(a)(5) permits a district court, "upon a showing of good cause or excusable neglect, [to] extend the 30-day appeal period for up to 30 days from the original deadline or until 10 days after the date of entry of the order granting the motion, whichever is later." Endicott, 116 F.3d at 56. However, in order for a party to avail themselves of an extension under Rule 4(a)(5), that party must "move [for an extension] no later than thirty days after the [30-day period otherwise applicable] expires." Fed.R.App.P. 4(a)(5)(A)(i); see also, Endicott, 116 F.3d at 56 ("Nor is [a district court] authorized to grant a motion that was filed beyond the 30-day extension period"); Avolio v. County of Suffolk, 29 F.3d 50, 52 (2d Cir. 1994) ("Under subdivision {5), the district court may extend the time upon a motion filed not later than 30 days after expiration of the original period, provided there is a showing of excusable neglect or good cause" (internal quotations omitted)).

Rule 4(a)(6) provides relief from the seemingly

harsh time constraints imposed by Rules 4(a)(1) and 4(a)(5). See Avolio, 29 F.3d 52. Specifically, Rule 4(a)(6) permits a district court to reopen the time to file an appeal where the movant was: "(1) . . . entitled to notice of entry of the judgment; (2) . . . did not receive such notice from the clerk or any party within 21 days of its entry; (3) . . . no party would be prejudiced by the extension; and (4) [the motion to reopen was made] within 180 days of entry of the judgment or within 7 days of . . . receipt of such notice, whichever is earlier." Id. Relief under subsection 6 is available only where the movant has satisfied the foregoing criteria.

II. Application

The final order of judgment in this action was entered on March 31, 2005 and Plaintiff's time for filing a notice of appeal lapsed on April 30, 2005. Plaintiff, therefore, may only proceed on appeal if either of the aforementioned exceptions permits a later filed appeal.

A. Rule 4(a)(5)

While Plaintiff cites Rule 4(a)(5) in support of her motion, it is not seriously argued that an extension under 4(a)(5) is available. The 30-day "grace period" for seeking an extension pursuant to Rule 4(a)(5) expired on May 30, 2005, and thus Plaintiff is precluded from availing herself of this subsection. See Panizza v. Mattel, No. 02-CV-7722, 2004 WL 324893 at *1 n.1 (S.D.N.Y. Feb. 19, 2004).

B. Rule 4(a)(6)

Plaintiff, however, is not similarly time-barred from seeking a reopening of the time for filing an appeal under Rule 4(a)(6). The key issue is whether and when Plaintiff received notice of the March Order and Judgment.

At the time the Order was issued and the Judgment entered, Plaintiff was represented by counsel. Thus, the Clerk's service of the orders upon Plaintiff's counsel was proper. See Fed.R.Civ.P. 5, 77(d); Ryan v. First Unum. Life Insur. Co., 174 F.3d 302, 305 (2d Cir. 1998). The electronic docket sheet indicates that notices of the Order and the Judgment were sent by the Clerk to Plaintiff's counsel via e-mail, without incident, on or about March 31, 2005. E-mail service of a notice of the entry of an order or judgment is authorized in this district and has been deemed to constitute proper service pursuant to Federal Rule of Civil Procedure 77. See E.D.N.Y. Administrative Order 97-12 ¶9 (October 1997) (detailing electronic filing procedures that provide, inter alia, e-mail notification of the entry of order by the Clerk to parties registered for ECF "shall constitute notice as required by Rule 77(d)"); E.D.N.Y. Administrative Order 2004-08 (adopting ECF).

If the docket entry were accurate, Plaintiff would not be able to seek any extension of time under subsection 6 because Plaintiff's counsel's office "receive[d] . . . notice [of the Order and Judgment] from the district court . . . within 21 days after entry." See Fed.R.App.P. 4(a)(6)(B), see also, Am. Boat Co. V.

Unknown Sunken Barge, 418 F.3d 910, 913 (8th Cir. 2005). Notwithstanding the information contained on the docket sheet, however, Plaintiff's counsel alleges that his office never received any e-mail notification of either the Order or the Judgment.

Plaintiff's counsel's objection begs the question of what significance is to be given to a docket entry indicating electronic service upon a party. The same issue was recently addressed by the Eighth Circuit in American Boat Company v. Unknown Sunken Barge, 418 F.3d at 913. There, the Eighth Circuit agreed with the district court's conclusion that, where the Clerk's ECF docket entries indicate "that an e-mail was sent [to a party] and not returned as undeliverable, then receipt of that e-mail would be presumed." Id. At 913-14. In reaching that conclusion, the Eighth Circuit acknowledged the maxims that "the clerk's docket entries are presumed correct in the absence of reliable evidence to the contrary," and that information sent via a reliable means, such as e-mail, may be presumed to be received. Id. At 914. As both of the foregoing maxims have been recognized by courts in this Circuit, the Court adopts the Eighth Circuit's reasoning and finds that the docket entries concerning delivery of the Order and Judgment in this action create a presumption that Plaintiff's counsel received notice of both orders. See e.g., Backo v. Local 281, United Bhd. Of Carpenters and Joiners of Am., 438 F.2d 176, *178 (2d Cir. 1970) (recognizing docket entry as "prima facie evidence" of the time when a complaint was filed); Kurz v. Chase Manhattan Bank USA, N.A., 319 F.Supp.2d 457, 463 (S.D.N.Y. 2004) ("It is well settled

that evidence of proper mailing gives rise to a rebuttable presumption of receipt.").

However, the Eighth Circuit also recognized, as does this Court, that such docket entries only create a presumption of receipt - a presumption that can be rebutted by a sufficient showing by the party denying receipt. In American Boat, the Eighth Circuit found a showing that "several intended recipients, most of whom were officers of the court . . . did not receive [notice of the challenged order]" warranted an evidentiary hearing to decide whether the presumption of delivery and receipt were rebutted. 418 F.3d at 914. Specifically, the court relied upon the movant's showing that: (1) the ECF system was only operational for a "few weeks", and might be subject to some "glitches;" (2) the lack of adequate operation was evidenced by the fact that "none of the attorneys who were designated to receive paper notice received a copy of the court's order;: and (3) another, non-moving party who was designated to receive electronic notification did not receive any notification. Id.

Albeit in a different context (concerning notification sent by the Clerk of the Court via first class mail), the Ninth Circuit in Nunley v. City of Los Angeles, found that the mere denial of receipt sufficiently rebutted the presumption of receipt such that the district court was obligated to "weigh the evidence and make a considered factual determination concerning receipt, rather than denying the motion out of hand based upon proof of mailing." 52 F.3d 792 (9th Cir. 1995). The Nunley court recognized, however, that denial of receipt simply "bursts the bubble" of

presumed receipt. The Ninth Circuit cautioned, "this movant still bears the burden of proving non-receipt . . . The factual question of receipt remains and may be decided in favor of receipt from the evidence of mailing, in spite of contrary evidence." Id.

Here, the Court is met with the very circumstances considered in American Boat and Nunley. Accordingly, the Court orders the Parties to appear for an evidentiary hearing concerning the issues of receipt. Pursuant to 28 U.S.C. §636(b)(1)(B), the Court refers the matter to Magistrate Judge Arlene R. Lindsay to conduct an evidentiary hearing and submit proposed findings of fact to the Court concerning whether and when Plaintiff's counsel received notice of the March Order and Judgment.

SO ORDERED

_____

Joanna Seybert, U.S.D.J.

Dated: Central Islip, new York
December 13, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
MADELINE DEMPSTER,

Plaintiff,

-against-

GEORGE G. DEMPSTER, THE LAW FIRM OF SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUNGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARDS FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ., jointly and individually,

Defendants.
----------X

MEMORANDUM AND ORDER

03-CV-1127(JS)

Appearances
for Plaintiff: Thomas F. Liotti, Esq.
Law Offices of Thomas F. Liotti
600 Old Country Road, Suite 530
Garden City, New York 11530

For Defendants: Shaw, Licitra; Shaw; Schwartz; Livoti, Flint; and Amadio: A. Michael Furman, Esq.
Kaufman, Borgeest & Ryan, LLP
99 Park Avenue, 19th Floor
New York, New York 10016

George Dempster George G. Dempster, *pro se*
P.O. Box 8065
Garden City, New York 11530-0864

SEYBERT, District Judge:

INTRODUCTION

Pending before the Court are objections to a Report and Recommendation ("Report") issued by Magistrate Judge Arlene R. Lindsay on May 12, 2006. The Report was issued at the request of this Court in connection with Plaintiff Madeline Dempster's ("Plaintiff") motion, pursuant to Federal Rule of Appellate Procedure 4(a)(6), requesting that this Court reopen her time to file a notice of appeal from this Court's order dated March 30, 2005 (the "March 2005 Order"), and Judgment entered March 31, 2005 (the "Judgment"). Magistrate Judge Lindsay found that Plaintiff's counsel, Thomas Liotti, failed to rebut the presumption that he received timely notice of the March 2005 Order and Judgment. Accordingly, Magistrate Judge Lindsay recommended that the Court deny Plaintiff's motion. For the reasons explained below, the Court ADOPTS the Report in its entirety.

BACKGROUND

The Court presumes the Party's familiarity with the facts of this case. Briefly stated, on March 30, 2005, this Court issued an Order dismissing Plaintiff's claims against Defendants Shaw, Licitra, Bohner, Esernio, Schwartz & Pfluger, P.C. ("the Law Firm"); J.

Stanley Shaw, Esq.; Jeffrey Schwartz, Esq.; Frank J. Livoti, Esq.; Edward Flint, Esq.; Alfred Amadio, Esq. (Collectively, the "Law Firm Defendants"); William Alesi, Esq., and George G. Dempster ("Dempster"). The March 2005 Order was docketed and posted to the Eastern District of New York's Electronic Case Filing System ("ECF") on March 30, 2005. The Judgment was entered in similar fashion on the following day, March 31, 2005. The docket indicates that Liotti's office received notice via electronic mail ("e-mail") of both the entry of the March 2005 Order and the entry of the Judgment. There was no indication of the e-mail notification being returned as undeliverable.

Notwithstanding this fact, Liotti represents that his office never received any e-mail notification of either the issuance of the March 2005 Order, or the entry of the Judgment. He claims that he first learned of the March 2005 Order in August 2005 and, shortly thereafter, filed the instant motion pursuant to Federal Rule of Appellate Procedure 4. In support of the motion, Liotti submitted his own affirmation and the affidavit of two employees. They claim that they never received any e-mail notification.

In an Order dated December 13, 2005 ("December Order"), this Court held that, based upon the Clerk's ECF docket entries, Liotti's office's receipt of notice of the March 2005 Order and Judgment should be presumed. See American Boat Company v. Unknown Sunken Barge, 418 F.3d 910, 913-14 (8th Cir. 2005). However, the Court found that Liotti's averment of non-receipt required an evidentiary hearing (the "Hearing"). The Court referred the

matter to Magistrate Judge Lindsay. After presiding over a two-day hearing, Magistrate Judge Lindsay concluded that Plaintiff failed to sufficiently rebut the presumption of receipt created by the ECF docket entries. Plaintiff timely filed objections to the Magistrate's Report.

STANDARD OF REVIEW

"The court may adopt those portions of a magistrate's report to which no objections have been made and which are not facially erroneous." V & S Vin & Spirit Aktiebolag v. Absolute Publ'g USA Inc., No. 05-CV-4429, 2006 WL 197001 at *2 (S.D.N.Y. Jan. 25, 2006). Otherwise, the Court, in this case, applies a de novo standard of review. See 28 U.S.C. §636(b)(1)(C); Fed.R.Civ.P. 72(b). De novo review does not require a district court "to rehear the contested testimony in order to carry out the statutory command to make the required determination." United States v. Raddatz, 447 U.S. 667, 674, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). The degree of reliance to be placed upon a report and recommendation is left within the "sound judicial discretion" of the district court. See id. at 676.

DISCUSSION

Plaintiff raises three objections to the Report, but only two require this Court's attention.[1] First,

---

[1] Plaintiff's counsel's bald assertions concerning what Magistrate Judge Lindsay "knew" is not relevant to the instant case. (Pl.'s Objections

Plaintiff claims that Magistrate Judge Lindsay improperly precluded Plaintiff's counsel, Anthony M. Battisti, from presenting certain testimony through Plaintiff's expert, Jeff Tannenbaum and improperly denied an adjournment that would allow for such testimony. Second, Plaintiff argues that Judge Lindsay drew an impermissible inference based upon correspondence submitted by Mr. Liotti in another matter, Faiz v. City of New York, 03-CV-595 (E.D.N.Y.). Neither objection is of any consequence. After reviewing the transcript of the hearing and all exhibits that were submitted, the Court concludes that Plaintiff has not sufficiently rebutted the presumption of receipt created by the ECF docket entry.

It is clear that Liotti's office has established procedures concerning how to deal with ECF notifications. Liotti's secretary prints out the notifications, and gives them to him. Then the notifications are placed in the appropriate case file. At the time when the March Order and Judgment would have been sent to Liotti's office, the person regularly charged with reviewing the ECF notifications was out sick. Instead a paralegal monitored the notifications. (Feb. 17, 2006 Hr'g Tr. At 46). None of these individuals recalls receiving an ECF notification regarding this matter.

Plaintiff claims that, if permitted, he would have elicited testimony from Tannenbaum concerning whether or not Liotti's office computer actually

---

at 9.)

received the e-mail. There is some support in the record for the assertion. When asked if Tannenbaum would testify that he did a review of the hard drive to find the e-mail, counsel for Plaintiff (Anthony Battisti) testified "Yeah, he will." (Id. At 67) A colloquy then ensued concerning whether or not there had been adequate disclosure with respect to the substance of Tannenbaum's testimony. (Id. At 67-76). During the course of the discussion, when asked by Magistrate Judge Lindsay whether Tannenbaum would testify that he had physically examined the computer and found no evidence of the receipt of the ECF notification, counsel for Plaintiff (Anthony Battisti) responded "He will not draw that conclusion." (Id. At 74) Magistrate Judge Lindsay and Mr. Battisti engaged in another telling colloquy:

> The Court: If there is no correlation between the inspection of the computer and an opinion he is going to render, there is no reason to refer to the inspection. Correct?
>
> Mr. Battisti: Correct.
>
> The Court: So based on what you told me, that is what happened, he inspected it but he doesn't have an opinion to proffer in that regard?
>
> Mr. Battisti: Correct.
>
> The Court: Then I will not allow reference to the inspection.

> Mr. Battisti: However, just to clarify things, the remainder of his opinion or his testimony will come in and that is -
>
> The Court: The remainder as described in the submission to the Court and to counsel, this generic description of the e-mail and again, as we started out this proceeding saying, I'm not so sure that any of that is particularly helpful, relevant or whether he has the experience to do that but I was going to proceed by hearing from his first and letting the defendants argue whether that should be precluded or not or stricken from the record and give them time to present rebuttal so we are going back to where we were.

Mr. Furman (Counsel for the Law Firm Defendants): Fine (Id. at 74-75.)

In his testimony, Tannenbaum detailed his work in the field of "e-mail solutions." He testified that he helps clients secure and register domain names for their business. He also sets up companies with a hosting facility allows the client to access the internet and host e-mail accounts. (Id. At 90.)

Magistrate Judge Lindsay qualified Tannenbaum as an expert with respect to e-mail communications, and heard testimony from his concerning the general set up of Liotti's office e-mail system, and the means by which e-mails are typically

transmitted. (Id. At 90.) Magistrate Judge Lindsay also heard testimony concerning the different fates that might befall an e-mail that was not properly transmitted, and heard Tannenbaum's opinion that 20% of all e-mails go undelivered. The only testimony Magistrate Judge Lindsay precluded Plaintiff rom eliciting concerning a study that Tannenbaum allegedly performed involving Liotti's computer that was previously undisclosed to his adversaries, and, to a lesser extent, a generalized study of a third party concerning e-mail receipt error rate that was similarly undisclosed. (Id. at 105-06, 116-17.) Plaintiff's assertion that he was unfairly denied an adjournment and precluded from submitting evidence about Tannenbaum's "effort to locate the missing ECF on the XO servers." (Pl.'s Objections at 8), is disingenuous and belied by Battisti's aforementioned representations to Magistrate Judge Lindsay. (Id. at 73). Accordingly, the Court declines to credit that portion of Plaintiff's objection.

This brings the Court to the most pivotal issue: Plaintiff's failure to rebut the presumption of receipt. Plaintiff's showing is not even in the same ballpark as the showing in American Boat, where the ECF system was only operational for a "few weeks", and might be subject to some "glitches;" "none of the attorneys who were designated to receive paper notice received a copy of the court's order;" and another non-moving party who was designated to receive electronic notification did not receive any notification. Id. Here, Liotti is the only one who did not receive notice of the March Order and Judgment. Liotti does not aver that there are any problems with his receipt of ECF notifications, nor was

there any testimony concerning e-mail receipt difficulties within his office during the relevant period.

Moreover, Liotti's claim of non-receipt is handicapped by the compelling testimony of Douglas Palmer ("Palmer"), the Court's chief deputy in charge of automated services and, most importantly, ECF. Palmer's testimony concerning the reliability of ECF is set forth in great detail in the Report. Palmer testified that, since the inception of ECF in 1997, there have been only two complaints of non-receipt - one of which is Plaintiff's. Palmer further testified that in march 2005, the Court sent 71,403 ECF notifications and received 396 bounces/error messages indicating that the court's ECF transmission was unsuccessful; Liotti is the only person to claim non-receipt without any corresponding error message. (Feb. 17, 2006 Hr'g Tr. at 127-29; Feb. 22, 2006 Hr'g Tr. at 69). Most notably, Palmer testified about a means by which Liotti's office might have been able to actually demonstrate that it never received the pertinent ECF notification by examining the MTA ("mail transfer agent") route of other e-mails received during the relevant period. (Feb. 22, 2006 Hr'g Tr. At 52-55.) Liotti never undertook such an examination.[2] In this

---

[2] As indicated above, Magistrate Judge Lindsay inquired about the substance of Tannenbaum's testimony with regard to non-receipt of the notification. Mr. Battisti assured Judge Lindsay that Tannenbaum would not testify about a specific investigation. During the colloquy, Judge Lindsay discussed the possibility of an adjournment.

regard, it is worth recognizing Plaintiff's second objection: Magistrate Judge Lindsay's improper inference from Liotti's conduct in another case.

Liotti's office was set to receive a daily ECF notification concerning activity occurring in his multiple cases. For the purpose of the Hearing, Palmer recreated the specific ECF notification of the March Order and Judgment. (Ct. Ex. 1.) In the same notification that detailed the Clerk's entry of the Judgment, Liotti's office was notified of an adjournment of a conference in Faiz v. City of New York, 03-CV-595, a matter before Magistrate Judge Kiyo Matsumoto. In a letter to Magistrate Judge Matsumoto dated April 6, 2005, Liotti referenced the adjournment order. Specifically, Liotti wrote, "I have received an order electronically from your chambers indicating that you have scheduled a conference for April 21, 2005 at 2:00 p.m." (Ct. Ex. 2. (Emphasis added).) The statement indicates that Liotti's office did, indeed, receive notification of the Judgment. Liotti explained the statement as an "unfortunate use of language." (Id. at 92.) He produced a hard copy of the scheduling order that was sent from Magistrate Judge Matsumoto's Chambers to his office in order to explain how he could have responded to the "conference order," yet not received the ECF notification. Plaintiff challenges any inference that

---

Battisti was well aware of the pertinent legal and factual issues, as well as his evidentiary shortcomings, yet did not request any adjournment. (See Feb. 17, 2006 Hr'g Tr. At 63-76.)

Magistrate Judge Lindsay might have drawn from the letter to Magistrate Judge Matsumoto.

No inference is drawn where an individual's words are taken at face value. Liotti plainly stated that he received the order electronically. The Court sees no error with any of Magistrate Judge Lindsay's inferences or credibility assessments with respect to the statement, and adopts her conclusions in their entirety. See Raddatz, 447 U.S. at 676. Moreover, the Court finds that, in this case, Plaintiff was required to do more than proffer a generalized expert opinion that 20% of e-mails go undelivered, and testimony that his staff didn't ever see the notification. As set forth in the December Order, there is a presumption of receipt based upon the ECF docket entry. At the Hearing, there was unrebutted testimony concerning the reliability of the ECF delivery system. Representatives from Liotti's office did not testify concerning any difficulties receiving ECF notifications, or difficulties with e-mails in general. If there were tests Plaintiff could have performed that might allow for a definitive answer, Plaintiff should have undertaken them. The failure to even endeavor to perform the tests weighs against Plaintiff. To date, Plaintiff has made no effort to supplement the record in any way.

CONCLUSION

In sum, the Court finds that Plaintiff has not sufficiently rebutted the presumption of receipt. Accordingly, his motion to reopen the time to file an appeal pursuant to Federal Rule of Appellate

Procedure 4 is DENIED. The Court ADOPTS Magistrate Judge Lindsay's Report in its entirety. The Clerk of the court is directed to CLOSE this matter.

SO ORDERED

Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
September 22, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of April, two thousand and eight.

Present: HON. JOSE A. CABRANES
HON. SONIA SOTOMAYOR
HON. RICHARD C. WESLEY
Circuit Judges

----------X

MADELINE DEMPSTER,

Plaintiff-Appellant SUMMARY ORDER

-against-

No 06-4771-cv

GEORGE G. DEMPSTER, THE LAW FIRM OF SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUNGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARDS FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ., jointly and individually,

Defendants-Appellees.

----------X

Appearing for Appellant: Jennifer L. McCann, Law

Offices of Thomas F. Liotti***

Appearing for Appellees: George G. Dempster, *pro se*
Ariel Michael Furman
Borgeest & Ryan, for defendants-appellants, The Law Firm of Shaw, Licitra, Bohner, Esernio, Schwartz & Pfluger, P.C., J. Stanley Shaw, Jeffrey Schwartz Frank J. Livotti, Edwards Flint, Alfred Amadio and William Alesi.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Joanna Seybert, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

*** Plaintiff terminated the services of her counsel, Thomas F. Liotti, prior to oral argument. She consented to counsel from his law offices presenting oral argument on her behalf. However, we question Liotti's continued representation under the circumstances. *See* N.Y. Lawyer's Code of Professional Responsibility DR 5-101(1)(A) ("A lawyer shall not . . . continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests . . .").

that the judgment of the District Court is AFFIRMED.

Plaintiff-appellant Madeline Dempster appeals from a judgment following the District Court's dismissal of her complaint and denial of her motion to reopen the time for filing a notice of appeal. The Court granted defendant's motion to dismiss in a Memorandum & Order dated March 30, 2005. Judgment was entered on march 31, 2005. The Electronic Court Filing ("ECF") system sent electronic notices of both the order and the judgment on March 31 and April 1, respectively. Plaintiff's trial attorney, Thomas F. Liotti, contends that he did not receive the ECF notification and did not learn of the entry of judgment until August 18, 2005 by which time the 30-day period for filing a notice of appeal had expired. *See* Fed. R. App. P. 4(a)(1)(A). Plaintiff subsequently filed a motion to enlarge the time to file a notice of appeal. The District Court determined that the docket entry did not conclusively establish that plaintiff had received notice of the order and judgment, but rather, that the docket entry established a presumption of notice. The District Court then referred the action to Magistrate Judge Arlene R. Lindsay who conducted a two-day evidentiary hearing on the issue of receipt of the ECF notification. After the hearing and upon the recommendation of the Magistrate Judge, the District Court denied the motion, adopting in full the report and recommendation of Magistrate Judge Lindsay. On appeal, plaintiff contends that the District Court erred in applying a presumption of notice and receipt to emails sent by the courts' ECF system and that District Court's refusal to reopen the time for filing a notice of appeal was erroneous. We assume the

parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

We review a District Court's decisions concerning the extension of time to file a notice of appeal for abuse of discretion. *See, e.g., Williams v. KFC Nat'l Mgmt. Co.*, 391 F.3d 411, 415 (2d Cir. 2004).

We conclude that the District Court did not err in refusing to reopen the time for filing a notice of appeal. There was no relevant evidence presented at the two-day hearing to indicate that the email in dispute was not received on the same day that the ECF system sent it. The evidence to indicate that the email was received on the same day that the ECF system sent it. The evidence to indicate that the email was received is overwhelming: Liotti admitted, in a contemporaneous writing to the Court, having received another electronic notice that was part of the same ECF report; the Court's own ECF administrator testified that Liotti's was one of only two claims of failed receipt of an ECF email without an error message being sent to the ECF administrator since the inception of the Court's ECF system; and Liotti's refusal to perform certain types of investigations on his own computer system to detect whether the message was received weighs against a conclusion that he did not receive an email. Accordingly, the evidence supports the denial by the District Court of the motion to reopen the time to file an appeal.

The judgment of the District Court is AFFIRMED.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court

By:_____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of June, two thousand and eight.

Present: HON. JOSE A. CABRANES
HON. SONIA SOTOMAYOR
HON. RICHARD C. WESLEY
Circuit Judges

----------X

MADELINE DEMPSTER,

Plaintiff-Appellant

ORDER

-against-

No 06-4771-cv

GEORGE G. DEMPSTER, THE LAW FIRM OF SHAW, LICITRA, BOHNER, ESERNIO, SCHWARTZ & PFLUNGER, P.C., J. STANLEY SHAW, ESQ., JEFFREY SCHWARTZ, ESQ., FRANK J. LIVOTI, ESQ., EDWARDS FLINT, ESQ., ALFRED AMADIO, ESQ., and WILLIAM ALESI, ESQ., jointly and individually,

Defendants-Appellees.

----------X

Madeline Dempster having filed a petition for panel

rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court

By:_____
Frank Perez, Deputy Clerk

Filed: June 20, 2008